IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

| | | |
|---|---|---|
| * * * * * * * * * * * * * * * | | |
| UNITED STATES OF AMERICA | * | CRIMINAL ACTION |
| | * | 11-186-S |
| VS. | * | APRIL 19, 2012 |
| | * | |
| JOSEPH CARAMADRE and | * | |
| RAYMOUR RADHAKRISHNAN | * | PROVIDENCE, RI |
| * * * * * * * * * * * * * * * | | |

HEARD BEFORE THE HONORABLE WILLIAM E. SMITH
DISTRICT JUDGE
(Motion to Suppress Rule 15 Depositions)

**APPEARANCES**:

FOR THE GOVERNMENT:
LEE VILKER, AUSA
and JOHN P. McADAMS, AUSA
U.S. Attorney's Office
50 Kennedy Plaza
Providence, RI 02903

FOR THE DEFENDANT
Joseph Caramadre:
JAMES T. McCORMICK, ESQ.
McKenna & McCormick
128 Dorrance St.
Suite 330
Providence, RI 02903

MICHAEL J. LEPIZZERA, ESQ.
Lepizzera & Laprocina
117 Metro Center Blvd.
Suite 2001
Warwick, RI 02886

FOR THE DEFENDANT
Raymour Radhakrishnan:
Olin Thompson, Esq.
Federal Defender's Office
10 Weybosset St.
Suite 300
Providence, RI 02903

Court Reporter:
Anne M. Clayton, RPR
One Exchange Terrace
Providence, RI 02903

Proceeding reported and produced by computer-aided stenography

19 APRIL 2012 -- 2:00 P.M.

THE COURT: Good afternoon. This is the matter of the United States versus Caramadre and the United States versus Radhakrishnan.

We're here on Defendants motions to suppress. Let's begin by having counsel identify themselves for the record, please.

MR. McADAMS: Good afternoon, your Honor. John McAdams and Lee Vilker on behalf of the United States.

MR. McCORMICK: James McCormick for Joseph Caramadre, your Honor.

MR. LEPIZZERA: Michael Lepizzera on behalf of Joseph Caramadre.

MR. THOMPSON: Olin Thompson for Mr. Radhakrishnan, your Honor.

And your Honor, Mr. Radhakrishnan is not here present today, but we're certainly willing to waive his presence and I believe the Court is aware of the circumstances.

THE COURT: Yes, I am. Is he on his way or is he just not going to be here?

MR. THOMPSON: He was not planning on coming and that was due to a miscommunication. If given a brief moment, I could have him try to come down, but it would take 45 minutes or an hour so I left it with him that I

was expecting he would not be needed here today.

THE COURT: Okay. That's fine. And you're waiving his right to be present, right?

MR. THOMPSON: Yes.

THE COURT: Okay. So I don't think there's any necessity for him to be here.

Let's get started. Who is going to be arguing?

MR. McCORMICK: Thank you, your Honor.

For the record, Mr. Caramadre is here, your Honor.

THE COURT: All right. Thank you.

MR. McCORMICK: Good afternoon, Judge.

Your Honor is certainly well familiar with these issues, having issued the order which granted authority for the depositions. We're in a radically different position today. At the time the motion for depositions was heard, the issue, based on my review of the papers, your Honor, and talking to the attorneys, I was not a participant in the case at that time, but it was presented by the Government in the context of these depositions being necessary for the prosecution of a crime which would not be prosecuted if it were not for these -- the testimony of these witnesses who were on death's doorstep and because of the necessity of these witnesses for the prosecution, these depositions were

imperative. And that was the foundation on which the Government based its application.

In my memorandum, I refer to numerous passages from their papers and from their argument where the Government talked about averting a travesty of justice.

THE COURT: Let's talk about that first because, you correct me if I'm wrong, but the way I'm kind of breaking all of this down is that unless I agree with you that there's some ground on which to revisit the order I issued in 2009, then this is really an 804 and a Crawford analysis that we have to engage in today. But if there's reason to revisit the order in 2009 because it was premised on incorrect information or the exceptional circumstances that I discuss in the order weren't really exceptional, then that changes everything.

MR. McCORMICK: That is my argument. That is my argument, your Honor.

THE COURT: Before you zero in on that, there were two aspects to the order in 2009. One was the statutory or the analysis of Rule 15. I understand you've incorporated all of the prior arguments of the Defendants on that position. We're not going to spend any time on that today, I don't think, because I'm not going to go back and change my mind about how I

analyzed the statute.

MR. McCORMICK: I didn't plan to do that, your Honor. I did rest on what would have been stated before.

THE COURT: All right. You preserved that argument for appeal.

You really are attacking the underlying premise of the exceptional circumstances, right?

MR. McCORMICK: Yes.

THE COURT: And if I agree with you, then there are issues; and if I don't, then we're into an 804 Crawford analysis.

MR. McCORMICK: Correct.

THE COURT: Okay. Good.

MR. McCORMICK: This is a -- the statute says in exceptional circumstances or in the interest of justice. Taking that concept, I believe the Court has the authority to revisit its decision that it previously made granting the taking of the depositions based on the situation as we now know it now that a couple of years has gone by, there's been an indictment issued and there's been discovery provided to us.

It's my position that the indictment and the later discovery have indicated that the necessity that was claimed by the Government was at that time

erroneous. I don't mean that in any derogatory sense. The Government just made a claim that in hindsight certainly wasn't borne out. The claim that these depositions were needed to bring the prosecution, the Government said in their papers the case would have been in all ways unprosecutable, I think was the word they used.

Your Honor in your decision indicated that you didn't want to run the risk that a person could get away with a crime he is alleged to have committed simply because the persons at issue were selected because they were terminal and they were going to pass away.

So I looked at that premise and saw that in hindsight it was wrong.

THE COURT: Why should we be looking at it in hindsight? Now, it would be one thing if the Government thought these people were going to die and wanted to take their depositions to preserve trial testimony and then they didn't die. Obviously, you wouldn't need the depositions then. You'd just call them as live witnesses if they're alive at the time of trial. So in that sense, in hindsight they were wrong but it doesn't matter because they're going to be live witnesses. But if the exigency turned out to be

somewhat different than they thought it was back in 2009, I'm not sure how that matters. If we know that the circumstances are a little bit different in 2012 than they were in 2009 but they still died, why does that matter? Isn't it what they knew in 2009?

MR. McCORMICK: No, your Honor. In 2009, what they knew was important for the getting of the deposition itself, the taking of the deposition. We're past that point now. Now we're at the point where the admission of the depositions into evidence, the suitability for introduction as evidence is what's in issue. That was also referred to in your Honor's decision saying that the remedy for any problem developing would be a motion to suppress.

Well, that's where we're at right now. That was, I think, the second selling point the Government made at the time they were taking the depositions was that, Look, let's take these things -- not to paraphrase, but let's take them first before they die and we can deal with the admissibility evidence later.

In other words, it was almost like a deferral of getting to the real meaty issue of whether these things could come into evidence. The point being let's take the depositions and we'll sort this thing out later on because by then the people presumably will have died

and we won't have them. This way at least the issue is preserved.

Well, right now the issue, I think, has been preserved. We're at the point where we're deciding whether these depositions were, in fact, actually necessary for the prosecution of the case as the Government says they were, because that was part of your Honor's decision, with due respect me telling your Honor what your decision said; but in the interest of justice, if that premise is false, that premise turns out to be incorrect, then these depositions just shouldn't go into evidence. That's the way that problem is fixed. That's the way that wrong is righted. The depositions were taken. Now, we look at the indictment, we look at the multiplicity of counts, the multiplicity of alleged victims, the multiplicity of there's two Defendants and three unindicted co-conspirators. And when you compare that indictment to what was -- what the Government was claiming at the time that they needed these six witnesses or ten witnesses to make their case, you can see that whatever these witnesses said, and we have their depositions, doesn't alter that indictment one bit.

In other words, the Government could still have gotten their indictment and they could still have

gotten the evidence that they have. There are some 40, I believe, 35 or 40 individuals that the Government is claiming were the annuitants or the bondholders in these allegedly fraudulent transactions. If you take out the deponents, the case is still the same. The deponents are not necessary. The Government's anticipation of their importance in hindsight is wrong. Now we know they're not necessary. The Government has a very detailed indictment containing all kinds of allegations with numerous other alleged victims. The deponents --

THE COURT: Isn't some of the testimony, though, doesn't it go to the question of whether the annuitants were, for example, told that their Social Security number was going to be used for a certain purpose, or they were going to be used for opening an account, that sort of thing? Isn't that at the heart of both the fraud and identity theft counts?

MR. McCORMICK: That evidence would probably be material, but it's cumulative at this point given the scope of the indictment. The evidence that these deponents would offer would be cumulative at best. The Government has indicated they have other evidence pertaining to these other individuals. There are three hundred some odd grand jury transcripts from testimony

given either by other annuitants or family members of annuitants who were present when these alleged representations were made or other individuals who may have been present.

In other words, there's other evidence the Government is alluding to which makes the evidence from the deponents at best cumulative; and for that reason, because it would not be necessary, I feel that it would be in the interest of justice not to allow these depositions to be introduced into evidence.

THE COURT: The Government is going to say that what you're really trying to do is to dilute the evidence and make it much less powerful because nothing's more powerful in a case of identity theft or fraud allegations of this nature than the direct testimony of the victims. And they're going to say why shouldn't we have the right to put on testimony of the victims of the crime. That's the best evidence of the crime.

There are some exceptions. For example, Mr. Pitocco might -- there's nothing in the indictment about Mr. Pitocco so we can kind of take him out of that discussion. But for those annuitants who are in the indictment, isn't it the best evidence?

MR. McCORMICK: When you say "best evidence,"

your Honor, it depends on I guess what side that you're looking at it from. Given their precarious health and sympathetic position, first of all I think it would be unduly inflammatory to hear the testimony of people who are on death's doorstep.

Second, you say "best evidence," I don't think that's the -- maybe it is or maybe it isn't. It probably shouldn't be because I think looking at a lot of the testimony of these witnesses, their primary response was that they just didn't hear or didn't know or had a failure of memory. A lot of times the failure of memory will translate into a defendant not informing us of something. Did you know that someone was going to make a lot of money on this? No, I didn't know that.

Well, if their memory failed and they said that, it can be taken as, Well, the Defendant never told us that.

So I think these deponents have testimony to offer, but I think without it the indictment and the proof of the case, basically, would stay the same. I think the depositions should not have been taken, because the way it was obtained, because the premise was, I think, faulty. I think not having this testimony does not work a prejudice on the Government.

The Government has their other evidence. I think having it does work a prejudice on the Defendants because there was some -- I forget who it was. I think it was Mr. M, I don't know if we can say the names in open court, but who was apparently making remarks that -- you know, would be certainly stricken.

There's a lot of things that -- other issues we'll have to raise later on, but I believe the depositions were not necessary, they're not necessary to the Government. There's a prejudicial aspect to them.

In other words, I feel that a jury seeing a tape of a terminally-ill person is just -- it will have an import more than it should. So I think that tips the balance in favor of not admitting them.

The remedy is, I believe, suppression of them, and I think it's a remedy that should be applied in this case, your Honor.

Now, the other aspect, I alluded to the indictment. There was some notice given to the targets, who weren't defendants yet, some notice given that these would be fraud cases, either mail or wire fraud involving representations, false representations to the annuitants that were then used to obtain a monetary benefit from certain insurance companies.

There was a reference to the using of identity information. But other than that, there wasn't really anything -- let's put it this way, if that were an indictment, it would fail, obviously.

THE COURT: But the key is if we're talking here about -- what you're really driving at is the fairness and the Sixth Amendment -- the vindication of the Sixth Amendment right to counsel before indictment.

MR. McCORMICK: Yes.

THE COURT: So what is the adequacy of notice to the Defendants of what the charges are, right?

So, okay, if that's what we're going to zero in on now, then let's do that. Are you done now talking about the inadequacy of the premise for the deposition?

MR. McCORMICK: Yes.

THE COURT: So now we're talking about the adequacy of notice. You tell me if you disagree with me. This is really a Crawford analysis, isn't it? Isn't it a question of whether you were able to -- whether the Defendants and their counsel were able to construct a productive cross-examination, meaningful cross-examination?

MR. McCORMICK: Yes.

THE COURT: Isn't that the question? So it's not -- I mean, that's the framework, isn't it? Maybe

it's not.

MR. McCORMICK: For that issue, I think it is. That's right.

THE COURT: All right. So in order to have a meaningful cross-examination, it would seem that the Defendants are entitled to, at a minimum, to know what it is that the Government is looking at charging them with. Now, you might say, well, they ought to have the indictment, but we're past that point.

So did the Government inform the Defendants that it was investigating all of the counts that are in the indictment?

MR. McCORMICK: No.

THE COURT: There's fraud.

MR. McCORMICK: Sorry. Go ahead.

THE COURT: There's fraud. There's identity theft. There's conspiracy. Does that cover it?

MR. McCORMICK: There's actually a money laundering and a witness tampering count, which I don't think -- I'm not sure those are impacted by the depositions or not, but there are multiple counts. When you saw "fraud," fraud can mean a lot of things without some kind of factual specificity. It's not just fraud. The Government was saying this was a fraud upon the measuring lives, the terminally-ill people.

When you read the indictment, you can see that the fraud is alleged to be more far-ranging than that in terms of the representations, who they were made to. The Government is alleging that representations were made to the securities firms that received these applications or the issuing companies, the companies that may have issued the accounts, which were used to purchase the bonds or the annuity companies.

THE COURT: That's all true, and I understand that from your briefs. But what do these depositions have to do with those counts of fraud? These depositions have to do with fraud on the annuitants, don't they?

MR. McCORMICK: Well, that's it. Without knowing the nature of the charges beforehand, it's impossible for a questioner to really anticipate what issues these might relate to. When questioning an elderly or a sick person about what one of the Defendants may have said to him when he filled out his application, if you were to understand or if it had been explained that one of the charges would be the conveyance of some false information from this interview to another party, say an agent or a securities broker, that type of information would be important in formulating a cross-examining strategy.

THE COURT: I haven't read every word of every deposition, but I've read a lot of excerpts of these depositions, direct and cross-examination, and I have a hard time understanding how any of these annuitants would have had any information that could have been gleaned from cross-examination that would in any way relate to the fraud that is allegedly perpetrated upon the other parties in this case. These folks, many of them barely knew anything about their own transactions with Mr. Radhakrishnan.

MR. McCORMICK: Judge, it's almost impossible to try to anticipate how additional questions could have been structured. Say if you had interview notes from one of the brokers, there could have been inquiry made of a deponent, did you have a conversation with such and such a broker at such and such a time. The results of those questions could have affected the ultimate credibility of the deponent. It could have related to other counts that were brought against the Defendants. I'm not trying to play dumb or be dumb, but at this point it's not really possible to formulate an exact defense strategy which would encompass the whole scope of the case.

THE COURT: I know you haven't reviewed every page and item of discovery, but you've had months here

and have reviewed thousands of pages of the Government's discovery.

Can you give me just one example, without revealing a defense strategy, one example of some question that you think you would have asked of one of these deponents that relates to the fraud counts that are directed at the other parties, not the annuitants? Just some example based on something that's in the discovery that if we had known this, we would have asked that. Can you just point to anything?

MR. McCORMICK: I can't do it as I stand here, Judge. It's a painstaking process to do that. I pointed out some examples of witness testimony with respect to Mr. PG and it involves painstakingly combing through and I just can't stand here and do it. But I also can't stand here and articulate --

THE COURT: That's the one where there were payments made, that contradictory information from a sister-in-law or brother- in-law, is that what you're referring to?

MR. McCORMICK: I don't think that was it, Judge. I refer to it in one of my memoranda, but that's part of the issue. I can't stand here and say what the defense -- the theory of defense is, nor would I feel comfortable doing that right now. It's the sort

of thing that you don't really disclose if you don't have to, and certainly not until you've actually had a chance to formulate it.

So I agree it makes it difficult for your Honor to assess this if I can't stand here and say, Oh, we would have asked this question of this witness or we would have asked this question of that witness. I just can't stand here and do that. What I can say is that had the questioning attorneys had the indictment before they did the depositions, they could have certainly used those indictments to tailor areas where they would question some of the deponents as to other contacts they may have had, as to other papers they may have filled out, as to other persons who might have information. In other words, to do the job that they should have been able to do had these deposition been taken after the indictment.

THE COURT: I want to -- I'm actually trying to drive at something here with these questions, but let me try to clear something up.

Can we refer to deponents' names in open court?

MR. McADAMS: Your Honor, I don't see why not. Their names are in the indictment. It's publicly -- they're in the pleadings and --

THE COURT: They're in the indictment. All your

pleadings are public, right?

MR. McADAMS: Yes, your Honor.

THE COURT: Nothing's under seal. All right. So let's just refer to them by name.

In your reply brief, you argue -- you do give an example I thought of what you were getting at with this business and that's with respect to Edwin Rodriguez. And there you talk about at the time of the deposition, the Government had not yet interviewed Rodriguez's brother, sister-in-law, Amy Rodriguez or Joan Horton, the hospice social worker that referred Rodriguez to Caramadre.

And then you suggest here that because of the information learned from these various interviews with these folks that the information they provided was contrary to the deposition of Edwin Rodriguez, right?

MR. McCORMICK: Yes. That's correct, your Honor.

THE COURT: So I take this to mean that you're making the argument that had this information been known prior to these depositions, then an effective cross-examiner would have been able to use this information to construct some impeaching evidence with Mr. Rodriguez, right?

MR. McCORMICK: That's an example of that,

correct.

THE COURT: Right. Okay. So isn't the solution, isn't a potential solution to that to -- if I were to allow the deposition of Rodriguez to be played in open court and given the fact that the witness is unavailable, I have the authority to structure the trial testimony any way that I think is appropriate and in the interest of justice.

So if I believed that that's a good argument, and I'm not saying I would do this but I'm just using this as an example, if I thought that this was a good point, that if you or Mr. Flanders had had the opportunity to have that information prior to the deposition, clearly they would have used it in the cross-examination, couldn't I allow the playing of the deposition and then allow you to put on these individuals or perhaps by stipulation put on information directly on the heels of that deposition testimony that points to this inconsistent testimony so that it's presented during the trial in the same order that essentially that it would have been had he been a live witness at trial. I can do that, can't I?

MR. McCORMICK: That can certainly be done, your Honor. The problem is doing this after the fact does not make up for what you could have done in cross at

the time. Cross-examination is a dynamic process. Once you confront a witness with some inconsistencies, sometimes that leads to other things.

THE COURT: That's not what Crawford allows for. Crawford talks about a meaningful cross-examination. Not a perfect cross-examination, not an ideal cross-examination, not the exact cross-examination that would have occurred if the witness was not unavailable but actually was live on the stand, but an effective or meaningful cross-examination. And I'm talking about going one step beyond that and giving you a little more latitude at trial to fill in a gap that you've effectively pointed to.

MR. McCORMICK: What's an effective cross to pass constitutional muster, I don't know where that fits in a case like this. I mean, the attorneys who questioned the witnesses and had a chance to direct their focus on the issues that were raised on direct examination and had a chance to ask the normal type of impeaching questions that you could ask any witness at any time, to me, that is not -- I don't consider that sort of purely reactive type of questioning to be effective cross. Effective cross is when you can exploit a witness to obtain information that is maybe favorable to your defense or you can obtain other

information that can be used to impeach him even further.

There's more to a cross than just reacting to points made on direct and then weakening the witness's recollection or his memory or pointing out some bias. That can be done with any witness in any case to a certain degree. I think more should be required in this case given the way these depositions were obtained. I think to say that we're going to obtain depositions premised on necessity and then you're going to get a chance to cross-examine based on only what we have now whereas if the deposition were put off until after the indictment, it could have been a whole different scenario, your Honor, but I can't stand here now and look back and predict how things would have turned out.

I mean, frankly, I shouldn't really have to. If we're at the point where we're trying to deconstruct this to see how much harm was done to Defendants, I think the answer is just not to let these things in at all if they're cumulative at best. So that's my basic position on trying to analyze and look back retroactively on the deposition and see how things would have been done differently.

As I stand here now, I can't do more than what

we've put in the memorandum, maybe with a more painstaking analysis after all the depositions that could be possible but that would have been something we would have been doing at trial had this case run its normal course, your Honor. And had we had that 72-page indictment to work from and all the thousands of pages of discovery, it could have been a very different cross but I can't stand here now and tell the Court how. And it's not our fault for that. It's just the way the situation played out given the way the depositions were obtained.

So I think the easiest way to view the effect of the indictment and whether that was sufficient or not is just to read it and look at what was told to us first and look at what type of notice is being given now. And then when you look at that, you look at all the thousands of pages of witness testimony and you try to plug that in to some overall theory of defense. And I just can't do it as I stand here, Judge, and I understand that. I don't want that to work to my detriment but there's just no way to undertake that task at the present moment. I feel the depositions shouldn't go in at all but --

THE COURT: I understand that, but I want to ask you about a couple other arguments you make in your

papers just so I get your response to a couple of things.

What is -- there is this claim that the Defendants were not on notice about the nature of the charges that would be in the indictment, but Mr. Vilker's statements both in writing, and Mr. McAdams as well, and orally here in Court seem to go into great deal about the nature of the -- what the Government was alleging was a fraudulent scheme. They seem to allude pretty clearly to the use of the annuitants, and I don't know how much they alluded to it, I want you to respond to this, to the identity theft aspect of what came about in the indictment. And then the third thing is conspiracy. You mentioned that there's a suggestion that how could they know about the allegation of conspiracy, but what's curious to me with that argument is that in the depositions you had an agreement that all of the attorneys' objections would be for everyone, right?

MR. McCORMICK: Yes, your Honor.

THE COURT: And I speak of you, but it was Mr. Flanders at the time.

MR. McCORMICK: Agreed. Yes.

THE COURT: And in the depositions, Mr. Traini made some specific Petrozziello objections, which goes

right to the conspiracy count. So obviously, if his objections are imputed to all Defendants, then the Defendants or the targets, I should say, were thinking about conspiracy. So how can you say that the Defendants had no idea that conspiracy was on the table as part of the potential indictment?

MR. McCORMICK: First of all, I don't believe the Government alluded to conspiracy as one of the type of charges. Certainly a forward-thinking lawyer can see that there's more than one defendant and say, well, maybe there's some allegation that there were some acts of some defendants in concert. Nothing was spelled out in terms of who conspired with whom or there was a specification of the time of conspiracy, I believe, from July of '07 to August of 2010. But other than that, there was no -- there was nothing put on at the time the depositions were at issue, there was nothing said about conspiracy or what counts or what types of conspiracy or who was conspiring with whom.

In other words, some of this you can probably -- probably could have been figured out, but I don't think that's sufficient to put people on notice. And again, I go back to the indictment. If the indictment had been produced prior to the depositions, the conspiracy question would have been cleared up a lot because it

would have specified --

THE COURT: Let me ask you this. Two parts. One, how does any of the testimony that was elicited from the deponents relate to the conspiracy counts? Second, if it does even arguably relate to the conspiracy count, couldn't I cure that with an instruction to the jury that the testimony is taken, maybe taken only for let's say the fraud counts or identity theft counts addressed directly to those defendants?

MR. McCORMICK: Possibly. But it doesn't retroactively make up for the lack of ability to cross-examine with the conspiracy counts in mind. For example, many of these deponents had dealings exclusively -- they say they had dealings exclusive with Raymour, the Co-Defendant. Had the specifications of conspiracy been laid out as they were in the indictment, there could have been further questioning as to specific areas, specific paragraphs in the indictment, which talk about some of the specifics of it. In other words, the conspiracy incorporated certain of the other allegations in the indictment. And it certainly in that sense provided some information to the Defendants about who is the conspirators and what they're conspiring for.

Some of this maybe could have been anticipated at the time but not nearly enough to be effective on cross, your Honor. Whenever you see more than one defendant you think of conspiracy. But in this case, defendants were in very -- seemed like they were in very different roles, and it's not the sort of thing where you could certainly foresee enough of the specifics without an indictment to really have an effective cross-examination.

So the Court can, I think, has the authority certainly to try to correct problems by allowing other evidence or restricting it. But my point right now is we shouldn't have to get to that point where the Court is piece-mealing these depositions. I think everyone is in a position where it's not really fair for the Defendant to be in. We're trying to put Band-Aids all over this case right now when really it shouldn't even be before us on that. So that's my answer on the conspiracy.

Now, as far as -- I think you referred to money laundering. We talked about that. And I believe on the conspiracy, we just didn't have enough information at the time, not nearly the information provided in the indictment. So I think that deprived us of our right to cross-examine on that with those points in mind,

your Honor.

THE COURT: Okay.

MR. McCORMICK: One of the other points we raised, this would go back to the necessity argument, again. I hate to backtrack but I'm looking at points I had on my list here. The Government, not to, again, not to besmirch them, was overly eager in representing the necessity of these depositions. There was a reference to the number of persons that comprised the pool of I guess potential witnesses. The Government made the representation that there were 112 victims and only 9 have survived.

We provided to the Court some attachments to the memorandum indicating that it was we that disclosed to the Government the identities of 156 individuals, 112 of those received the $2,000 initial payment only and that was a payment where the person responded or replied to an ad and they received $2,000 without any conditions, without any obligation. And some individuals decided after receiving that $2,000 that they didn't want to do anything further for any other -- to receive any further funds. They just received the $2,000. That was the 112. And I don't believe the Government is alleging they were the victims because their names didn't appear on any

annuity or bond.

From number 45 to 156, that's some forty -- give or take here. There's approximately 40 individuals that are described in the indictment as so-called victims. These are individuals who did go beyond the $2,000 initial payment and seek to offer their identities or their signatures to get a further payment. The numbers are probably immaterial. Nine persons alive. There's still nine persons alive. But this is an example, I think, of the Government having a false impression themselves of how necessary these depositions really were. It's not like there's 9 people alive out of 112. It's 9 people alive out of 40. It's still only nine people but I think my point is that these depositions weren't necessary.

Could I have a moment, please, your Honor?

THE COURT: Sure.

(Pause.)

MR. McCORMICK: That's all I have to say, your Honor. The memorandum was drafted by myself and Mr. Lepizzera. I would ask that he be allowed to speak also.

THE COURT: Sure. That's fine.

Mr. Lepizzera, do you want to add anything?

MR. LEPIZZERA: Just a couple of things, your

Honor.

THE COURT: All right.

MR. LEPIZZERA: It's an unusual time right now where we're looking back and we're trying to figure out what questions would we ask. I don't really think that should be the analysis. I think the analysis should be that we had no idea what the scope of the indictment was going to be. I don't think there's any doubt about it. I think the Government can come up with correspondence back in 2009 where Mr. Vilker and Mr. McAdams were bantering out words of wire fraud, mail fraud, maybe even identity theft, your Honor. And we'll give them that.

I guess the real question for Mr. Caramadre is how large of an indictment is this going to be, how many victims were there going to be, how many counts were there going to be.

In this case here, I counted at least victims when I hitched them to a particular substantive count, I've got about 44 victims, alleged victims. Mr. Caramadre, the evidence is going to show, met with approximately four of them. So that leaves about 40 people where Mr. Radhakrishnan met and that's what the evidence is going to show.

So we get into the situation of it's not only

put a witness on the stand and having an opportunity to cross-examine because an opportunity to cross-examine isn't just pointing a finger and being able to ask any question challenging a witness's testimony. It's looking at the indictment itself, analyzing it and saying before I cross-examine this witness, what is my defense to this case? And I don't think Mr. Flanders or Mr. Pine or anyone else back then knew there were going to be 66 counts with 44 victims.

THE COURT: That's all true, but here's the thing. It's absolutely true that the decisions you make about whether to cross-examine at all and how many questions to ask, what areas to go into are made in a trial setting and are always made in light of everything that's happened in the trial and may vary depending on how things are proceeding. I grant you that. But you haven't lost with respect to these witnesses very much of that decision-making power.

So for example, if I allow the Government to put these depositions on at trial, you can make a decision at the very last moment to do no cross-examination, that is, to not show the cross-examination of the deponents if that's what you want to do. You have that discretion. Even though we may have gone through the videotapes, you've designated your anticipated

cross-examination, you can decide at the last minute, stand up and say I don't want that cross-examination shown. I'd grant that. I would not force you to show a cross-examination that during the midst of trial you decided you didn't want to have shown. Just as if a witness goes on the stand, you thought you were going to cross-examine him and you change your mind at the last minute. So that option is always there.

MR. LEPIZZERA: I'm glad you pointed that out because I was a little concerned about that, that the deposition has taken place and we're now stuck with the entire transcript.

THE COURT: I don't think you should be stuck with that. I think you have the right to designate the cross-examination but you also have the right to do no cross-examination. So you have that option. You have the option to show the cross-examination that you designate in advance subject to my rulings on various objections, and, as I alluded to with my question to Mr. McCormick, I would probably give you some latitude with respect to putting on evidence out of order if you could really show me that there was some area that you didn't get to go into that you later became aware of by virtue of the discovery the Government gives you between now and trial and you could really show me that

you would have gone into this area, I might allow you to actually put some evidence on to supplement.

So I don't think there's much that is lost. The only thing that potentially is lost is what Mr. McCormick couldn't answer, and I don't think you can either, which is to tell me that there's some big area of cross-examination that we would have gone into had we known then what we know today. And nobody can do that.

MR. LEPIZZERA: The difficulty is, and we did get early discovery in this case because it's a monster of a case, as I put in the brief. This is an aggressive trial schedule and we're going forward in November. I always thought with this type of evidence it could be a 2013 or 2014 case, but Mr. Caramadre has requested a speedy trial and he's getting one, and we'll be ready in November.

So we're in a difficult position obviously to stand here when we're still going through all the evidence. I can quantify it. I probably touched maybe 35 percent of it. So I'm still going through that stuff. So it's kind of difficult for me to say we'd do this or we'd do this differently.

THE COURT: But you understand what I'm saying about what is potentially lost in terms of the

cross-examination is pretty narrow.

MR. LEPIZZERA: Yes.

THE COURT: All right. Anything else you want to talk about?

MR. LEPIZZERA: No.

THE COURT: Okay. Mr. Thompson?

MR. THOMPSON: I'll be brief as well, your Honor. Thank you.

Your Honor, you made a comment about Mr. Traini's Petrozziello objection, and I hadn't thought of that issue and I think it's an excellent question given the fact that there had been agreement that an objection for one Defendant is an objection for all.

What I would say to that is I think that type of objection, the Petrozziello objection is necessarily only defendant-specific because you're asking for an assessment of whether a statement made in furtherance of a conspiracy was actually made in furtherance of it and if there, in fact, was a conspiracy.

So when Mr. Traini makes that objection, he has to be making it only as regarded in this case his client, who, as your Honor is aware, ended up not being charged in the indictment at all so it may be that the Government thought that that objection made sense. It

could be that Mr. Traini had been in discussions separately with the Government about how his client may have been liable and maybe they had spoken about conspiracy. But the fact of the matter is as far as the Defendants that remain standing at this time, to my knowledge, and I wasn't involved in the case at this time, but to my knowledge there was no discussion that conspiracy may have been one of the counts or one of the bases for --

THE COURT: How could any of the deponents' testimony have anything to do with the conspiracy counts against your client or even Mr. Caramadre?

MR. THOMPSON: There was certainly some indication, I believe, in at least one of the deponents' depositions that at least one other individual was present at the deposition on behalf of Mr. Caramadre's company. I believe Mr. Craddock was present for part of it. So certainly there would be some issue there with whether that could be related to a conspiracy or not, whether -- this is just an example off of the top of my head but whether Mr. Caramadre could have been sending someone along with these meetings and had knowledge about it. That's certainly an area that both Mr. Pine and Mr. Flanders could have examined had they been aware that this could be an

allegation in the case.

THE COURT: If there was anything in the depositions that pertained to the conspiracy charges against Mr. Radhakrishnan or Mr. Caramadre, couldn't I just give the jury an instruction that says these deponents' testimony may only be considered with respect to the fraud and identity counts against the two Defendants?

MR. THOMPSON: You certainly could give an instruction, your Honor, but given the nature of this case that it's anticipated to be two to three months at a minimum that the jury is going to be weighing all this evidence and all these counts, your Honor really has a Herculean task instructing the jury to begin with. And I think the jury is going to have a very hard time distinguishing between counts and distinguishing what's going on. And I think this idea that your Honor would instruct them that this piece of evidence is only for this count, that's going to get lost at the end of two or three months of direct examination.

So frankly, I think, no, I don't think that would be satisfactory, because, frankly, I just don't think the jury is going to be able to understand that fine a point.

Your Honor remarked earlier that the direct testimony of the victim, there's nothing more powerful than that. There's nothing more powerful for the prosecution to put that on as part of their case. And I would counter that by pointing out that that's true and there's, therefore, no more valuable a defense tool than what's guaranteed by the Sixth Amendment, which is cross-examination and confrontation. Allowing these depositions in essentially allows the prosecution the most powerful tool available to them but limits the Defendant's ability to actually confront them and cross-examine them.

You've asked several times what I think is the appropriate question, what other questions would have been asked. And I'd suggest to the Court that this is not an issue of just what questions would be asked, but there's whole areas of cross-examination that were not known to the defense and were certainly not explored by the defense.

In Mr. Caramadre's filings in the response, Mr. McCormick points out a number of those. One is the deposition of Mr. Rodriguez that you've already spoken about. That's the issue of whether his family members were aware of these checks and whether, therefore, Mr. Rodriguez would have been impeached with that

information. And he certainly would have.

Another example is Mr. Wiley's deposition about which the defense was unaware at the time but is now aware based on discovery that Mr. Wiley had had interactions with Hospice Care and conversations with Hospice Care about the nature of these investment programs, the fact that the first $2,000 was purely a charity and the fact that there were other opportunities beyond that. A number of these deponents, I believe, had those kinds of conversations with Hospice Care.

Since the depositions, we've come to learn of conversations these deponents had with healthcare workers, with members of their own families. We found out what their families told to investigators over time. And these are all things that would have been used and all areas that would have been examined to try to find out these deponents' understanding of what happened while Mr. Radhakrishnan was in the room.

So specifically, if Mr. Wiley, for example, had had conversations with a Hospice Care worker before meeting with Mr. Radhakrishnan, that would certainly be relevant. It may have refreshed Mr. Wiley's memory as to, Oh, yeah, the hospice worker told me that this could be about opening accounts.

THE COURT: I don't remember if it was in Wiley's deposition, but there were a number of questions about the involvement of hospice social workers and even the hospice attorney of the deponent.

MR. THOMPSON: That's true, your Honor. That's absolutely true. It's my understanding that the defense attorneys on the case at the time of these depositions were not in possession of specific reports of investigation relating to those hospice workers. So while the defense attorneys were able to ask did you speak to a hospice attorney or who referred you to this program, the defense was not aware of the other end of those conversations having been able to read the investigations which involved what the Hospice Care workers had to say, what did they tell Mr. Wiley. And that could have, as Mr. McCormick points out, that could have led to all sorts of things, including the possibility that each of these deponents said, Hey, you know what, that's right. I was reminded beforehand and, yeah, Mr. Radhakrishnan did say something about a brokerage account or something like that.

So I would suggest that allowing the Government their most powerful tool, while at the same time limiting the Defendant's most powerful tool, your Honor could give an instruction, your Honor could allow

testimony out of order. And certainly any time hearsay comes in, the defense is entitled to try to cross-examine that hearsay with whatever means they would have if the person was live. But, again, it's simply not going to be as effective as if we were allowed to actually confront the live witness in front of the jury of these facts.

THE COURT: That may be true but I just don't see that that's the standard. That's not what Rule 804(b)(1) or Crawford required. Neither requires the most effective cross-examination or the best cross-examination or the identical cross-examination. They just don't require that.

MR. THOMPSON: But they require at least a true opportunity at a cross-examination.

THE COURT: Let's see what the First Circuit says about 804(b)(1) in Bartelho. I think this is cited in the briefs. Quoting the **United States versus Lombard**: "The party against whom the prior testimony is offered must have had a similar, not necessarily an identical motive to develop testimony in the prior proceeding."

I mean, that's pretty broad.

MR. THOMPSON: It is. The motive prong is not particularly what I'm discussing at this point in time.

I think your Honor by your order of -- by your order allowing the depositions, you instructed the Government to provide all Jencks and all Brady material as if this was trial testimony, all material available to the Government at that time. And I think the reason you did that had to have been in order to give the defense the best opportunity to cross-examine that was available at the time. Because, obviously, if the Government had provided absolutely nothing and the Defendant had to cross-examine these people cold, knowing nothing about the case, that would not have been a full opportunity to cross-examine.

I think what the Defendants are putting forth before you now, your Honor, is that there is so much additional information that the issue should not be what Jencks or Brady was available to the Defendants at the day of the depositions but what additional Jencks and Brady had been made available to them since then. What would have been the cross-examination if we were able to use that material? And I think in this case, for each of these deponents, it's substantially different.

So the Government is allowed to present this testimony based only on that limited cross-examination, but the defense is not allowed the full chance to

demonstrate to the jury weaknesses based on the additional material.

Thank you, your Honor.

THE COURT: Okay. Thank you.

All right. Mr. McAdams?

MR. McADAMS: Thank you, your Honor. Your Honor, this testimony is critical testimony. It goes right to the heart of the case. It is the only direct evidence by the victims of the identity fraud, the terminally-ill people themselves who were involved in this scheme. Trials are about truth seeking. The whole purpose of a trial is so that the finder of fact, the jury can decide whether or not the Defendant is guilty of the crime. And that's what -- and Rules of Evidence are designed to let the jury hear the evidence. And this is material relevant evidence. And the defense has not offered any legitimate reason to keep this evidence out.

THE COURT: But there's also the Sixth Amendment, right?

MR. McADAMS: Yes, your Honor, and the Sixth Amendment was well protected. As your Honor knows, that was the very reason that we brought the Rule 15 motion in the first instance, in order to protect the Defendant's Sixth Amendment rights. Your Honor's own

order quoted that the Government was doing this to protect Defendants or targets Sixth Amendment rights if by force, I think was the exact language used in the order.

So the very purpose of this entire procedure was it was highly unusual where you're actually going to know that a witness is not going to be available. It's just not something that is normal. Usually we're all sitting here, everybody thought the witness would be available and we're trying to go back and use the various tests to determine whether or not the cross-examination had a similar motive and opportunity, whether it was a suppression hearing or some civil trial or some other related deposition.

Here we all knew these witnesses are not going to be available. We knew that because Mr. Caramadre and Mr. Radhakrishnan went out and sought people that they expected to die and made misrepresentations to them so that they could obtain money from these financial insurance companies. Of all the things that weren't known, that was the one thing that was known at the time.

THE COURT: But in order to vindicate the Sixth Amendment rights that are at play here, there has to be notice. You'd agree with that.

MR. McADAMS: I agree, your Honor, completely.

THE COURT: So what is the notice to the Defendants that identity theft was part of the likely counts in the indictment? And beyond that, conspiracy. Most of what I recall and what I've read about Mr. Vilker's and your representations is that this was a fraud case.

MR. McADAMS: Yes, your Honor. I'll take them one at a time, and I'll start with the identity theft, your Honor.

The Government, myself and Mr. Vilker, specifically met with Mr. Flanders and Mr. Connolly who were representing both Mr. Caramadre and Mr. Radhakrishnan at the time prior to us ever filing the Rule 15 motion. At that point, we were actually negotiating possibly on a voluntary basis both sides going out and doing some depositions. We specifically in that meeting told them that the charges under consideration were wire or mail fraud, identity theft and aggravated identity theft. I noted that in the Government's response to the Defendants' memorandum and that's simply what happened.

They were raising issues about whether or not any representations that were made to terminally-ill people that might have been false would be material.

They were raising this sort of divergence issue with us. We in response to that specifically sent them an e-mail citing of a First Circuit case, **United States v. Christopher**, that addressed that issue of materiality and that's included as an exhibit in our response as well. In that e-mail it doesn't say "identity theft," but that was in the context of that meeting that we had with Mr. Flanders and Mr. Connolly.

In addition, I mean, the basic -- and I cite in our response to the original motion to suppress several instances both in our written pleadings to the Court and in the oral argument on September 17th, 2009, in which we summarized the theory of the case. And in all of those, I believe, we basically said that the theory of the case is that the Defendants, Mr. Caramadre, Mr. Radhakrishnan, the other then parties at the time, made material misrepresentations to terminally-ill people in order to get their identity information and use that to perpetrate a fraud on these financial services companies.

Although that's note, quote unquote, the word "identity theft," that's the heart of what aggravated identity theft is, use of identity information in furtherance of a specified crime.

So I think it was clear both because we directly

told them but also because of the context of what was going on that that was part of the allegations that we were making.

And with respect to the conspiracy, I think it really is one of these -- it was so blatantly obvious to everybody that we were talking about a conspiracy that we didn't need to say it. I mean, you're talking about two, at the time four targets who we were saying engaged in this scheme to defraud people together. A conspiracy is an agreement to commit a crime. That's what it is.

So we're all professionals. Mr. Flanders, Mr. Pine, Mr. Traini, these are some of the best defense attorneys in Rhode Island. I don't think that anyone thought we need to tell them, Oh, by the way, we're thinking about a conspiracy here. That's the reason for the Petrozziello objection. I don't know if Mr. Thompson is attempting to waive that objection that we'd all agreed applied to everybody or not but we all understood that Mr. Radhakrishnan's statements to each of these terminally-ill people when he met with them were in the Government's view co-conspirator statements being made in furtherance of the conspiracy. That's why he's making that objection. And that's why it goes to the heart of the case. The representations that are

being made are proof of the conspiracy. Mr. Radhakrishnan is going in to meet with these terminally-ill people and telling them, "Mr. Caramadre sent me."

THE COURT: It wouldn't be Mr. Thompson's role to waive Petrozziello objections on behalf of the other Defendants, right? Because it's his client who is making the statement. It's the others who would have the objection, right? Mr. Caramadre and other targets would be saying, Wait a second.

MR. McADAMS: Well, yes. But, I mean, for example, Mr. Mizzoni, all the representations were made by Mr. Caramadre. So everybody understood rather than have a chorus of objections throughout these depositions that we would just agree that one objection was for all. We certainly never took the position that, you know, that somehow Petrozziello is an exception to that rule.

THE COURT: All right. Let me focus you on a couple of other issues. What do you say to the suggestion that I made that if it turns out that some gaps in the cross-examination can be demonstrated by defense counsel prior to trial that they should be allowed to structure the presentation of additional evidence out of order that would have been developed in

the cross-examination so that the jury can have the opportunity to hear that when the deposition is played and not two months later?

MR. McADAMS: I certainly don't disagree the Court has the authority to do that. I think probably what we'd like to do in that circumstance is get an attorney proffer as to what they anticipate that was going to be. With respect to the example that was cited, the Rodriguez testimony, I anticipate the Government will call the sister-in-law and the brother, and so some of these situations may not need to get there, so to speak.

THE COURT: All right. I want to focus you in on the deposition testimony of Mr. Pitocco. I have a couple of concerns about that testimony. One is Pitocco is not mentioned in the indictment so I have, at the threshold, I have a hard time understanding how his testimony is really relevant to any of the counts of the indictment.

Now, I expect you'll say, well, it's evidence of the course of conduct and the way that they dealt with these individuals and so forth. But it seems to me that the Pitocco deposition reveals a serious question about his competency at the time that he was deposed and would create all sorts of potential -- I think the

Defendants would have a pretty legitimate argument that there's a 403 problem with that testimony.

It would also create all sorts of the need to bring in people to, like the attorneys in the civil case, to make clear that he did sign the document when he says he didn't sign it. I mean, are you really pressing the Pitocco deposition?

MR. McADAMS: I understand the concern, your Honor. We have not at this point made a determination whether we would seek to introduce the Pitocco deposition at trial or not because we're going through that same analysis ourselves as to whether it is worthwhile or not. Essentially, the defense files a motion to suppress all of the testimony. They didn't distinguish, at least in their initial pleadings, they didn't distinguish between any of the depositions and so we're responding to that almost as a whole. So we didn't divide that up. But it may be that we don't press the Pitocco deposition.

THE COURT: There's also the business about the Bradshaw deposition, which the Defendants claim you don't want to put it on because it's favorable to the Defendant, but I take it your position is they can use it if they want to use it?

MR. McADAMS: Well, they can use it if they want

to use it. I certainly don't agree that it's favorable to the defense. Mr. Bradshaw testified that he had had no idea that his name was on any of these accounts, but I think what he also testified was basically that he really didn't pay attention to anything that was being said to him. So it doesn't really add all that much if he didn't listen to what was being said. So that's really the reason that we're not putting it on, not because he in any way testified favorably to the defense. I think at best he's a wash. And that was the reason that we had basically come to the conclusion we wouldn't push Mr. Bradshaw.

THE COURT: But you don't disagree that they can use the deposition if they wish?

MR. McADAMS: No. They have the right to call their own witnesses.

THE COURT: All right. Anything else you want to add?

MR. McADAMS: Unless the Court has some specific questions, I'm certainly prepared to argue all the points I raised in my papers. I won't belabor them. These are critical witnesses. They go to the heart of the case. They are the only witnesses that have direct relevant testimony. They're the only witnesses that can say yes or no I gave my consent to be used as a

measuring life in this scheme that Mr. Caramadre and Mr. Radhakrishnan executed, and so they're not cumulative. And even if they were cumulative, your Honor, although this issue wasn't really raised, this sort of 403 argument really wasn't raised in any of the briefs that the Defendants filed, the Government has the burden of proof. We have to prove the case beyond a reasonable doubt. There's all sorts of case law out there that shows that 403 is a rule of admissibility, not exclusion, and that because of the Government's heavy burden the Court gives leeway with respect to putting on its best case, its strongest case even at the risk of cumulativeness.

So that's really all I had to say on that point, but I don't think they are cumulative but even if they were, certainly we'd be requesting that the Court give a little bit of leeway with respect to that.

Thank you.

THE COURT: All right. Thank you, Mr. McAdams.

Do you want to reply to anything, anyone on the defense side?

MR. McCORMICK: No, your Honor.

MR. THOMPSON: No, thank you, your Honor.

THE COURT: All right. Thank you.

I'm going to take this under advisement. I'm

going to give you an order. I think I can get it done in fairly short order, giving you my rulings on the motion and any guidelines I may add to that. And it's possible, I'm not saying I'm going to do this, but it's possible that some of the rulings may put off to a future time some aspects of the admissibility of some pieces. But I'll give you an order and we'll go from there. Shouldn't take too long.

Okay? Thank you.

(Court concluded at 3:25 p.m.)

# C E R T I F I C A T I O N

I, Anne M. Clayton, RPR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

/s/ Anne M. Clayton

_____

Anne M. Clayton, RPR

February 12, 2014

_____

Date